(5)

No. 95-6556

In The

Supreme Court of the United States

October Term, 1995

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

If the defendant in a felon in possession of a firearm case offers to stipulate to his status as a felon, should the district court require the government to accept the stipulation and preclude the government from introducing evidence of the nature of the prior felony conviction?

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OPINION BELOW

The opinion of the court of appeals is unreported, but the judgment is noted at 56 F.3d 75 (Table). (reprinted at J.A. 49-59). The order denying rehearing and rejecting the suggestion for rehearing *en banc* is also unreported. J.A. 60.

JURISDICTION

The court of appeals entered its judgment on May 31, 1995. J.A. 49. A petition for rehearing and suggestion for rehearing *en banc* was denied on August 2, 1995. J.A. 60. The petition for a writ of certiorari was filed on October 30, 1995. On February 20, 1996, this Court granted certiorari along with petitioner's motion to proceed *in forma pauperis*. J.A. 68. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fifth and Sixth Amendments to the U.S. Constitution are reproduced at App. 1a. The relevant provisions of 18 U.S.C. §§ 922 and 921 (Supp. 1996) are reproduced at App. 1a-2a.

Congress enacted the Federal Rules of Evidence in 1975. Pub. L. No. 93-595, 88 Stat. 1926 (1975), 28 U.S.C. App. (1988). The complete text of Rules 105, 401, 402, 403, 404 and 609 are reproduced at App. 2a-5a. The Advisory Committee's Notes are set forth in full in Federal Rules of

Evidence for the United States Courts and Magistrates (West Publishing Co. 1995).

STATEMENT OF THE CASE

In February, 1994, Petitioner Johnny Lynn Old Chief was indicted in the United States District Court for the District of Montana for felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count I); using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (Count II); and assault with a dangerous weapon, in violation of 18 U.S.C. §§ 1153 and 113(c) (Count III). J.A. 3-5. The predicate felony for Count I was Old Chief's 1989 conviction in the same United States District Court for assault resulting in serious bodily injury. J.A. 3-4. Despite Old Chief's offer to stipulate, the trial court admitted evidence of his prior felony assault conviction. J.A. 6-11; 21. Old Chief did not testify at trial. The jury found Old Chief guilty of all three counts. Tr. 337-338. Old Chief was sentenced to imprisonment for a total of fifteen years.[1] J.A. 46-47; 66. He is presently incarcerated.

[1] Old Chief has appealed his sentence to the Ninth Circuit twice. The first time, the circuit panel vacated his sentence and remanded for resentencing. J.A. 59. On remand, the district court imposed the same fifteen year sentence. J.A. 66. Old Chief appealed from the second judgment and review of his sentence is presently pending in the Ninth Circuit in case No. 95-30283. Old Chief's sentence is not an issue in the case before this Court.

1. Relevant Facts

The events that led to this case occurred after a group of people went on drinking binges that lasted several days. Tr. 100, 128, 140, 154, 284. Unfortunately, drinking to the point of memory loss is not uncommon on the Blackfeet Indian Reservation in Browning, Montana. Tr. 118-119, 128, 140-141. Following a drunken fist fight, a gun was discharged but no one was hurt. Tr. 130-132. The gun belonged to someone other than Old Chief, and had been secreted under the driver's side of the seat in the truck in which Old Chief had been riding, but which was neither owned nor driven by him. Tr. 240-241, 190, 82, 252. Bullets and a shell casing were found in Old Chief's pocket, but the fingerprint lifted from the hand gun was not Old Chief's. Tr. 168, 219, 221.

There is conflicting eyewitness testimony: some of it identifies another of the drinkers as the shooter, some of it confirms the incident but does not directly implicate Old Chief as the shooter. Tr. 94, 97, 110, 123, 139. Significantly, the only witness who identified Old Chief as the shooter, Ms. Everybody Talks About, had earlier admitted that she was the one who shot the gun. Tr. 243. Another person involved, Ms. Spotted Eagle, admitted that she, and not Old Chief, shot the gun. Tr. 265-266. Over objection, evidence of Old Chief's prior felony assault conviction was presented to the jury. J.A. 18-22; Tr. 74-75.

2. Motion in Limine

Prior to trial, Old Chief moved the district court *in limine* to order that the prosecution be restricted from offering any information or details about Old Chief's

prior felony conviction, except to state that he had been convicted of a crime punishable by imprisonment exceeding one year. J.A. 6-10. Old Chief asserted that the jury would be unfairly influenced to convict him of the pending assault counts if informed that he had previously been convicted of assault resulting in serious bodily injury. J.A. 7, 10.

Old Chief offered to stipulate to his status as a felon. J.A. 7. He requested the district court to instruct the jury that he "has been convicted of a crime punishable by imprisonment for a term exceeding one year." *See* Defendant's Proposed Jury Instruction No. 7. J.A. 11. The government refused the offered stipulation, claiming that it should not be "compelled to accept a stipulation when offered." J.A. 12. Although the prosecutor knew that § 922(g)(1) "requires proof of the *existence* of a felony," he never stated why evidence of the *nature* of the felony was necessary. J.A. 13 (emphasis added). The government never asserted that it needed Old Chief's prior assault conviction as "other crimes evidence" under the Fed. R. Evid. 404(b) exception.

Following submission of written arguments, the district court held a pretrial hearing on the motion *in limine*. J.A. 14-16. The district court denied the motion *in limine* stating, "[i]f he [the prosecutor] doesn't want to stipulate, he doesn't have to." J.A. 16. A one-line written order denying the motion followed, devoid of any reasons for the denial. J.A. 17.

3. Evidence of Prior Assault Conviction Admitted at Trial

Over objection, a certified copy of Old Chief's 1989 federal conviction of assault resulting in serious bodily injury was admitted into evidence. J.A. 21. This unredacted document specifies that Old Chief "did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury" and further states that Old Chief be imprisoned therefor for five years. J.A. 18-19.

The jury heard about the prior felony assault during five stages of the trial. First, the indictment was read to the jury at the start of voir dire. Tr. 25. Second, the prosecutor mentioned it in the government's opening statement. Tr. 52. (" * * * the defendant was, indeed, convicted of a felony at that time, assault resulting in serious bodily injury"). Third, the certified copy of the assault conviction judgment was admitted into evidence as Government's Exhibit No. 1. J.A. 21; Tr. 74-75. Fourth, the prosecutor again focused the jury's attention on the prior assault during summation. Tr. 282 (" * * * the Defendant was convicted of assault resulting in serious bodily injury here in this Court"). Finally, twice during the charge to the jury, the trial court specifically mentioned Old Chief's assault resulting in serious bodily injury conviction. J.A. 33, 34.

After reading the instructions to the jury, the trial court held an instructions conference pursuant to Fed R. Crim. P. 30. Tr. 331-335. The trial court overruled Old Chief's objections to the instructions and did not modify its written instructions. Tr. 333-335. After the jury retired

to deliberate, the jurors were provided with Government's Exhibit No. 1 along with a written copy of the trial court's jury instructions. Tr. 331-333.

4. Opinion of the Court of Appeals

The Ninth Circuit Court of Appeals affirmed. J.A. 49-59. A panel of that court held that the trial court did not abuse its discretion in admitting evidence of the nature of Old Chief's prior felony assault conviction. J.A. 50-51. Citing *United States v. Breitkreutz*, 8 F.3d 688, 690, 691-692 (9th Cir. 1993), the three judges reasoned that "the government is entitled to prove a prior felony offense through introduction of probative evidence" and that a stipulation "has no place in the FRE 403 balancing process." J.A. 51. The court also limited application of *United States v. Hernandez*, 27 F.3d 1403 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1147 (1995), to the "proposition that a defendant's stipulation to a prior felony conviction is sufficient evidence to fulfill the requisite element of § 922(g)(1)." J.A. 51. The court declined to extend *Hernandez* to support "the quite different proposition" that the government must always accept a defendant's stipulation to a prior felony to prove the prior felony conviction element of § 922(g)(1). J.A. 51.

Old Chief subsequently filed a petition for rehearing and suggestion for rehearing *en banc*. He contended that the panel's opinion failed to address a conflict in the Ninth Circuit as to whether the government can be required to stipulate, in a § 922(g)(1) case, that a defendant has a prior felony conviction, citing *United States v. Barker*, 1 F.3d 957, 959 n.3 (9th Cir. 1993), *amended on denial of reh'g*, 20 F.3d 365 (1994) and *United States v. Breitkreutz*, 8 F.3d 688, 690-692 (9th Cir. 1993). The petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected. J.A. 60.

SUMMARY OF ARGUMENT

The plain language of Title 18, United States Code, § 922(g)(1) proscribes firearm possession by a person convicted of a felony, defined as a crime punishable by imprisonment exceeding one year. Section 922(g)(1) is a status crime. Neither the description and nature, nor the name and factual details, of the prior felony conviction are elements of Section 922(g)(1).

The issue of consequence in a § 922(g)(1) prosecution is the defendant's status as a felon. The character and details of the prior felony are irrelevant and immaterial. The majority circuit rule excludes such evidence. Section 922(g)(1) does not embrace additional facts such as a particular kind of felony.

With few exceptions, the Federal Rules of Evidence do not allow evidence of a defendant's prior criminal record to be admitted at trial. This rule is subject to some restriction, as when a prior crime is an element of the later offense. Because status as a felon is an essential element of § 922(g)(1), some prejudice from the jury's knowledge of the fact of the prior conviction is unavoidable. However, prejudice becomes unfair when the nature of the prior felony conviction is presented to the jury. Excluding the nature of the prior felony conviction can limit the prejudice from the evidence presented to the

jury. Where the danger of unfair prejudice substantially outweighs the probative value, the circuit court majority has concluded that evidence beyond the fact of the felony conviction in a § 922(g)(1) prosecution is inadmissible.

For Petitioner Old Chief, the joinder of the § 922(g)(1) count with the other counts caused an unfair spillover effect. The predicate for his § 922(g)(1) count was assault resulting in serious bodily injury. Once elevated (or diminished) to the status of a convicted felon, additional counts alleging crimes of violence further exacerbate the unfair prejudicial impact. The danger of undue prejudice by allowing the government to introduce evidence regarding the nature of Old Chief's prior felony conviction was manifest in view of the virtually identical charges in the indictment.

A stipulation to a defendant's status as a felon allows the jury to appreciate the seriousness of the predicate crime, without prejudicing the jury with potentially inflammatory specifics. If a defendant stipulates to his status as a felon, the trial court should then instruct the jury that the defendant has been convicted of a crime punishable by imprisonment for a term exceeding one year, thus satisfying the prior felony conviction element of § 922(g)(1). Stipulation to the accused's status as a felon as a procedure to eliminate unfair prejudice in § 922(g)(1) cases does not interfere with the prosecution's burden to prove every element of the crime. To the contrary, since the predicate crime is significant only to prove status, excluding the nature and circumstances of a defendant's prior felony conviction does not prevent the jury from being apprised of all the elements of a § 922(g)(1) offense. A court-mandated stipulation allows

the prosecution broad discretion to introduce the underlying circumstances of a crime when those circumstances are truly relevant to the presentation of the case.

Trial courts must be alert to factors that may undermine the fairness of the fact-finding process and infringe on the presumption of innocence. Courts must carefully guard against dilution of the presumption of innocence and exercise sound discretion to prevent any undue prejudice caused by evidence of the nature of a prior felony conviction. The trial judge in his case disregarded the danger of prejudice despite Old Chief's offer to eliminate (or reduce) unfair prejudice through the proffered stipulation. Indifference resulted in repeated reference to the nature and circumstances of the prior assaultive crime and improper jury instructions. The judge breached his duty and abused his discretion.

The jury had no need to know the nature of the prior conviction; all that it needed to know was that Old Chief had a prior conviction sufficient to sustain that element of the crime of felon in possession of a firearm. The statute requires nothing more. Fairness demands nothing less.

ARGUMENT

I. THE NATURE OF A DEFENDANT'S PRIOR FELONY CONVICTION, AS DISTINGUISHED FROM THE FACT OF THE PRIOR FELONY CONVICTION, IS NOT RELEVANT TO THE STATUS AS A FELON ELEMENT IN A FELON IN POSSESSION OF A FIREARM CASE

A. The Fact, Not the Nature, of the Prior Felony Conviction is an Element of 18 U.S.C. § 922(g)(1)

Section 922(g)(1), Title 18 U.S.C., provides in pertinent part that "[i]t shall be unlawful for any person – who has been convicted of a crime punishable by imprisonment for a term exceeding one year- * * * to * * * possess in or affecting commerce, any firearm * * * ." App. 1a. This offense, commonly called felon in possession of a firearm, requires proof of three essential elements: (1) the accused previously had been convicted of a crime punishable by a term of imprisonment exceeding one year; (2) the accused knowingly possessed a firearm; and (3) the possession was in or affecting commerce, because the firearm had travelled in interstate or foreign commerce at some point during its existence. *See, e.g., United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 797 (1996); *United States v. Mains*, 33 F.3d 1222, 1228 (10th Cir. 1994); *United States v. Rumney*, 867 F.2d 714, 721 (1st Cir. 1989), *cert. denied*, 491 U.S. 908 (1989); and Devitt, Blackmar, Wolff & O'Malley, *Federal Jury Practice and Instructions* (4th ed. 1990) § 36.09. The element at issue here is the prior felony conviction element.

As this Court has repeatedly stated, the purpose of § 922(g)(1) and other statutes restricting the possession of firearms by certain individuals is to prevent crime. "Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119 (1983); *Scarborough v. United States*, 431 U.S. 563, 576 (1977) (" * * * the congressional plan to 'make it unlawful for a firearm * * * to be in the possession of a convicted felon' 114 Cong.Rec. 14773 (1968)"). Section § 922(g)(1) does not require description and proof of the nature, including the name and factual details, of the prior felony conviction. Rather, the plain language of the statute proscribes firearm possession by a person convicted of a felony, which is defined as a crime punishable by imprisonment exceeding one year. "The status element is a discrete and independent component of the crime, a requirement reflecting a Congressional policy that possession of a firearm is categorically prohibited for those individuals who have been convicted of a wide assortment of crimes calling for a punishment of over a year's imprisonment." *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (*en banc*). Thus, § 922(g)(1) is a status crime. Possession of a firearm is illegal for an individual with a felony conviction. "What little legislative history there is that is relevant reflects an intent to impose a firearms disability on any felon based on the *fact* of conviction." *Lewis v. United States*, 445 U.S. 55, 62 (1980) (emphasis added).

Section 921(a)(20), Title 18 U.S.C., was enacted in 1968 to exclude certain prior convictions from the ambit

of § 922(g)(1) and other firearms prohibition statutes.[2] App. 1a-2a. Congress amended § 921(a)(20) in 1986.[3] However, nothing in the original or subsequent versions of § 921(a)(20) added any requirement to § 922(g)(1) that the nature, name or details be included in the prior felony conviction element of that offense. "The existence of *the fact* of a prior conviction * * * is the only information that Congress has deemed of consequence concerning the defendant's criminal record." *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (*en banc*) (emphasis by the court).

Pattern jury instructions define the prior felony conviction element of § 922(g)(1) as "[t]he defendant *[name]* has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." Devitt, Blackmar, Wolff & O'Malley, *Federal Jury Practice and Instructions* (4th ed. 1990) § 36.09; *see also* Fifth Circuit Pattern Jury Instructions (Criminal Cases) (1990 ed.) No. 2.44 and Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit (1985 ed.) No. 26.[4] The *nature* of the prior felony conviction is not considered an element of § 922(g)(1).

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[2] Pub. L. 90-618, § 102, 82 Stat. 1216 (1968)

[3] Firearm Owners Protection Act, Pub. L. 99-308, § 1101, 100 Stat. 450 (1986)

[4] Fifth Circuit No. 2.44: " * * * That before the defendant possessed the firearm, the defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense."

Eleventh Circuit No. 26: " * * * That before he received the firearm the Defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense."

Although the 1992 version of the Ninth Circuit model instructions suggested that the *name* of the prior felony conviction be submitted to the jury as part of the prior felony conviction element of § 922(g)(1),[5] the 1995 edition of the Ninth Circuit's model jury instructions eliminates the nature of the prior felony conviction from this element: "at the time the defendant possessed the [describe the firearm], the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year." 9th Cir. Crim. Jury Inst. 8.19P (1995). The comment to the 1995 version of No. 8.19P recognizes the possibility of a stipulation to the prior felony element and even suggests that, in absence of such a stipulation, "the judge may wish to instruct the jury as a matter of law that a certain crime is punishable by imprisonment for a term exceeding one year." 9th Cir. Crim. Jury Instr. 8.19P comment (1995); *see also* District of Columbia Criminal Jury Instruction 4.79, comment at 477 (4th ed. 1993) (the first mention of the nature of the prior felony should be omitted when it is not "in issue in any particular case.")

While § 922(g)(1) represents a significant departure from the traditional rules of fairness concerning the admission of prior convictions into evidence (see *United States v. Wacker*, 72 F.3d 1453, 1473 (10th Cir. 1995)), there is nothing within § 922(g)(1), or its legislative history, which requires anything more than the *fact* of the prior felony conviction as an element of the offense. In short,

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[5] "At the time the defendant possessed the [*describe the firearm*], the defendant [e.g., had been convicted of [*insert name of felony*]]." 9th Cir. Crim. Jury Inst. § 8.19P (1992).

"[t]he nature of the conviction is not an element of Section 922(g)(1)." *United States v. Rhodes*, 32 F.3d 867, 871 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1130 (1995).

B. The Nature of the Prior Felony Conviction is Unnecessary, Immaterial and Irrelevant to the Status as a Felon Element of 18 U.S.C. § 922(g)(1)

1. The Nature of the Prior Felony Conviction is Unnecessary and Immaterial

Courts which have addressed the issue have determined that the nature and details of a prior felony conviction are not necessary to prove the prior felony conviction element of a § 922(g)(1) offense. "The jury had no need to know the nature of the prior conviction; all that it needs to know is that there was a prior conviction sufficient to sustain that element of the crime." *United States v. Gilliam*, 994 F.2d 97, 103 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 335 (1993). The government does not need to establish the nature of the prior felony to meet its burden of proof.[6] "The statute requires only that the government prove that the defendant 'has been convicted * * * of, a crime punishable by imprisonment for a term exceeding one year.' " *United States v. Jones*, 67 F.3d 320, 324 (D.C. Cir. 1985). There is simply no need for evidence of the nature of a prior felony conviction in a

[6] McCormick defines "need" in the context of other crimes evidence as "the actual need for the other crimes evidence in the light of the issues and the other evidence available to the prosecution * * * ." *McCormick's Handbook of The Law of Evidence* § 190 at 453 (2nd ed. 1972).

§ 922(g)(1) prosecution. *United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir. 1976) ("An important consideration relating to probative value is the prosecutorial need for such evidence."); *see also United States v. Breitkreutz*, 8 F.3d 688, 694 (9th Cir. 1993) (Norris, J., concurring) ("An unredacted judgment tells the jury something it has no need to know: the nature of the felony for which the defendant stands convicted.")

Other courts, speaking in terms of materiality, have reached similar conclusions, finding that the nature and underlying circumstances of a prior felony conviction are "obviously" and "wholly" immaterial to the defendant's *status* as a convicted felon. "Whereas the fact of the defendant's prior felony conviction is material to a felon in possession charge, the nature and underlying circumstances of a defendant's conviction are not." *United States v. Wacker*, 72 F.3d 1453, 1472 (10th Cir. 1995). *See also United States v. Rhodes*, 32 F.3d 867, 874 (4th Cir. 1994) (Hamilton, J., concurring) ("obviously immaterial"), *cert. denied*, 115 S.Ct. 1130 (1995); and *Breitkreutz*, 8 F.3d at 694 (J. Norris, concurring) ("The nature of the prior felony is wholly immaterial to [the defendant's] status as a convicted felon.")

Accordingly, to prove the element of status as a felon for a § 922(g)(1) offense, the government needs only the fact of the prior conviction, not the nature of it. And only the fact of the prior conviction is material.

2. The Nature of the Prior Felony Conviction is Irrelevant

Evidence in criminal trials must be "strictly relevant to the particular offense charged." *Williams v. New York*, 337 U.S. 241, 247 (1949). Evidence is admissible under the Federal Rules of Evidence "only if" it is relevant. *Huddleston v. United States*, 485 U.S. 681, 689 (1988). The nature of the prior felony conviction is not "inherently" relevant to the prior felony conviction element of § 922(g)(1).

"Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Advisory Committee's Notes on Fed. R. Evid. 401, 28 U.S.C. App. p. 688." *Huddleston*, 485 U.S. at 689. Evidence is relevant only if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401, App. 2a; *United States v. Abel*, 469 U.S. 45, 50-51 (1984).

The name or details of the defendant's prior felony do not make it "more or less probable" under Rule 401 that the defendant is a convicted felon. *United States v. Wacker*, 72 F.3d 1453, 1472 (10th Cir. 1995); *United States v. Breitkreutz*, 8 F.3d 688, 694 (9th Cir. 1993) (Norris, J., concurring) (The nature of the prior felony does not satisfy the Rule 401 definition of relevancy). Section 922(g)(1) makes the *fact* of the prior conviction "of consequence" to whether the accused is a convicted felon, but it "does not embrace additional facts such as a particular

kind of felony." *United States v. Tavares*, 21 F.3d 1, 4 (1st. Cir. 1994) (*en banc*).

A primary consideration in determining probative value is "how strongly the proffered evidence tends to prove an issue of consequence in the litigation." *United States v. Palmer*, 37 F.3d 1080, 1084 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1804 (1995). The issue of consequence in a § 922(g)(1) prosecution is the defendant's status as a felon. The nature of the felony conviction has no tendency to prove that status. If there is no need for such evidence, it has no probative value. *United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir. 1976).

Evidence "which is not relevant is not admissible." Fed. R. Evid. 402, App. 2a-3a. Thus, if the evidence of the nature of the prior felony conviction is not relevant to § 922(g)(1), it is not admissible under the Federal Rules of Evidence. "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton v. United States*, 391 U.S. 123, 131 (1968) (citing *Blumenthal v. United States*, 332 U.S. 539, 559-560 (1947)).

Most circuit courts have concluded that the nature of a defendant's prior felony conviction is not relevant to a § 922(g)(1) case. "The underlying facts of the prior conviction are completely irrelevant under § 922(g)(1) * * * " *United States v. Wacker*, 72 F.3d 1453, 1472 (10th Cir. 1995). "The predicate crime is significant only to demonstrate status, and a full picture of that offense is – even if not prejudicial – beside the point." *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (*en banc*). The nature of the prior felony is not relevant to a § 922(g)(1) offense because

§ 922(g)(1) requires proof only of the defendant's status as a felon. *United States v. Jones*, 67 F.3d 320, 323 (D.C. Cir. 1995). "The *underlying facts* of the prior conviction * * * are completely irrelevant to § 922(g)(1)." *United States v. Gilliam*, 994 F.2d 97, 103 (2nd Cir. 1993) (emphasis by the court), *cert. denied*, 114 S.Ct. 335 (1993); *see also United States v. Milton*, 52 F.3d 78, 81 n.7 (7th Cir. 1995) (" * * * if a defendant offers to stipulate to the fact of the prior felony conviction, evidence of the nature of the conviction is irrelevant and will not be admitted."), *cert. denied*, 116 S.Ct. 222 (1995); and *United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir. 1976) ("The full record of the judgment of conviction was not relevant * * * .").

The opinion of the majority of the panel in *United States v. Breitkreutz*, 8 F.3d 688, 691 n.4 (9th Cir. 1993), relied upon by the panel in Old Chief's case, is the *only* circuit court decision which has concluded that the nature of the prior felony conviction is relevant, stating " * * * while the underlying facts of the felony may not be relevant, the conviction judgment or other proof – which may state the nature of the conviction – most certainly is." This statement is illogical and without justification. The underlying facts of the prior felony conviction are one and the same as the nature of the prior felony conviction. Certainly, if the underlying facts of the prior felony are irrelevant, then the nature of the prior felony is also irrelevant. As Judge Norris pointed out in his concurring opinion, "[b]ecause the nature of the defendant's prior conviction is irrelevant to a prosecution under § 922(g), the admission of a full conviction judgment into evidence necessarily constitutes trial error." *Id.* at 694. Also, as Judge Norris noted, the majority's holding is in direct

conflict with another panel of the Ninth Circuit. *Id.* at 693. In *United States v. Barker*, 1 F.3d 957, 959 n.3 (9th Cir. 1993), *amended on denial of reh'g*, 20 F.3d 365 (1994), the court found that the "underlying facts of the prior conviction are completely irrelevant under § 922(g)(1); the existence of the conviction itself is not."

. While the fact of the prior felony conviction is an essential element of § 922(g)(1), *see, e.g., Tavares*, 21 F.3d at 4 and *Barker*, 20 F.3d at 366 n.3, the nature of the prior felony conviction is not. *United States v. Rhodes*, 32 F.3d 867, 871 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1130 (1995). Furthermore, the fact of the prior, i.e., the defendant's status as a felon, is relevant, the nature of the prior is not. Because it was not relevant to the felon status element, the nature of Old Chief's prior assault conviction should not have been admitted into evidence or otherwise been mentioned at trial to the jury.

II. THE NATURE OF A DEFENDANT'S PRIOR FELONY CONVICTION CREATES THE DANGER OF UNFAIR PREJUDICE WHICH OUTWEIGHS ANY PROBATIVE VALUE IT MAY HAVE IN A FELON IN POSSESSION OF A FIREARM CASE

A. The Nature of a Defendant's Prior Felony Conviction is Unduly Prejudicial

1. Evidence of the Fact of a Prior Felony Conviction is Always Prejudicial

Evidence of the accused's status as a felon, without the name or underlying details of the prior conviction, is inherently prejudicial. Evidence is prejudicial if it "appeals to the jury's sympathies, arouses its sense of

horror, provokes its instincts to punish, or triggers other mainsprings of human action * * * ." 1 *Weinstein's Evidence* § 403[3], pp. 37-41. A jury is more likely to convict a defendant if it knows that he is already a convicted felon. The underlying premise of our criminal justice system is that the defendant must be tried for what he did, not for who he is. See, e.g., *United States v. Hodges*, 770 F.2d 1475, 1479 (9th Cir. 1985). As stated by former Chief Justice Warren in his dissent in *Spencer v. Texas*, 385 U.S. 554, 575 (1967):

> Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a "bad man," without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him.

With few exceptions, the Federal Rules of Evidence do not allow evidence of a defendant's prior criminal record to be admitted at trial. Evidence of the criminal history of the accused is excluded by Fed. R. Evid. 404(a) unless the accused puts his character at issue. App. 3a. Fed. R. Evid. 404(b) provides that evidence of other crimes "is not admissible to prove the character of a person in order to show action in conformity therewith." App. 3a-4a. This conforms with the principle that evidence may not be admitted if its only relevance is to

show the propensity of the accused to commit another crime. See Fed. R. Evid. 404 advisory committee note.

Evidence of bad character or prior bad conduct is unfair not because it has no appreciable probative value, but because it has too much. Wigmore, *Evidence in Trials at Common Law*, § 58.2, at 1212 (Tillers rev. 1983). As this Court stated in *Michelson v. United States*, 335 U.S. 469, 475-476 (1948), evidence of other crimes is not excluded because it is irrelevant, but because "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." The Court noted that this rule may be "subject to some qualification, as when a prior crime is an element of the later offense." *Id.* at 475 n.8.

Because Congress has made status as a felon an element of § 922(g)(1), some prejudice from the jury's knowledge of the *fact* of the prior conviction is unavoidable.[7] Without question, the fact of a prior felony

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[7] Admittedly, the jury must be told that the accused is a convicted felon in order for a § 922(g)(1) offense to be proven. Efforts to completely eliminate the jury's awareness of a defendant's status as a felon, or to otherwise bifurcate the prior felony conviction element into a separate trial, have been uniformly rejected by the circuit courts. See, e.g., *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993), *amended on denial of reh'g*, 20 F.3d 365, 365-366 (1994) (citing cases from the 1st, 2nd, 7th, 10th and 11th Circuits). The courts have advanced a number of reasons why the jury must be told of the fact of a defendant's prior felony conviction. First, the government would be precluded from proving an essential element of the offense. *United States v. Gilliam*, 994 F.2d 97, 100, 101-102 (2nd Cir. 1991), *cert. denied*, 114 S.Ct. 335 (1993); *United States v. Jacobs*, 44 F.3d

conviction in a § 922(g)(1) prosecution is, by itself, prejudicial. This prejudice becomes unfair when the nature of the prior felony conviction is presented to the jury. The prejudice can be limited by excluding the *nature* of the prior felony conviction from the evidence presented to the jury.

2. The Nature of a Prior Felony Conviction Creates the Danger of Unfair Prejudice

"Unfair prejudice," within the context of Fed. R. Evid. 403, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily,

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1219, 1224 (3rd Cir. 1995), *cert. denied*, 115 S.Ct. 1835 (1995). Second, the district court would breach its duty to instruct the jury on all essential elements of the crime charged. *United States v. Milton*, 52 F.3d 78, 80-81 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 222 (1995). Third, the jury may be confused because possession of a firearm, in and of itself, is not illegal and the jury may thus be prompted to nullify on the unwarranted belief that the defendant was charged for non-criminal conduct. *United States v. Collamore*, 868 F.2d 24, 28 (1st Cir. 1989). Fourth, to bifurcate or otherwise preclude the jury's consideration of a defendant's status as a felon would be contrary to the presumption against special verdicts in criminal cases. *United States v. Aguilar*, 883 F.2d 662, 690 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991). In sum, such a procedure would remove an element of the crime charged from the jury's consideration, prevent the government from having its case decided by a jury and change the very nature of the charged crime. *Gilliam*, 994 F.2d at 102, *cert. denied*, 114 S.Ct. 335 (1993); *Barker*, 20 F.3d at 366. While these are very compelling reasons against precluding the jury from learning of a defendant's status as a felon, none of these reasons justify informing the jury of the *nature* of the prior felony in a § 922(g)(1) case.

an emotional one." Fed. R. Evid. 403 advisory committee note. In a criminal case, unfair prejudice is that "aspect of the evidence which makes conviction more likely because it provokes an emotional response in a jury or otherwise tends to affect adversely the jury's attitude towards the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged." *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982).

The "unnecessary risk of unfair prejudice looms as clear and likely" when evidence of the nature of the prior felony is introduced in addition to evidence of the fact of the prior felony. *United States v. Tavares*, 21 F.3d 1, 6 (1st Cir. 1994) (*en banc*).[8] The nature of the prior felony offense serves only to prejudice the defendant because "it will likely influence even the most conscientious juror's perception of the defendant." *United States v. Rhodes*, 32 F.3d 867, 874 (4th Cir. 1994) (Hamilton, J., concurring), *cert. denied*, 115 S.Ct. 1130 (1995). This prejudicial impact has been described as "obvious" and "always prejudicial." *United States v. Milton*, 52 F.3d 78, 81 (4th Cir. 1995), *cert.*

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[8] The nature of the prior felony conviction is usually prejudicial to the defendant and certainly was in Old Chief's case. However, the *Tavares* court states that if a § 922(g)(1) offense is charged in a single count indictment and the predicate felony is a technical, non-violent or white collar crime, evidence of the nature of the prior felony should not be admitted even if it is beneficial, rather than prejudicial, to the defendant. *Id.* at 4. Nonetheless, in certain multiple count cases, such as where a murder charge is joined with a § 922(g)(1) count based on a non-violent predicate felony, the only way to avert prejudice, in absence of severance, would be to inform the jury of the nature of the non-violent prior conviction.

denied, 116 S.Ct. 222 (1995); *United States v. Jones*, 67 F.3d 320, 322 (D.C. Cir. 1995).

3. The Danger of Unfair Prejudice is Magnified When a Felon in Possession of Firearm Count is Joined with Other Charges

Joinder of a felon in possession of a firearm count with other charges, as in this case, may result in an "unfair spillover effect." *United States v. Jones*, 16 F.3d 487, 491 (2nd Cir. 1994). Damaging information about one defendant derived from joined counts is much more difficult for jurors to compartmentalize than evidence against separate defendants joined for trial. *United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986), *amended on denial of reh'g*, 798 F.2d 1250 (1986) ("Studies have shown that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case. See Tanford, Penrod & Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Human Behavior, 319, 331-35 (1985); Bordens & Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 Law and Human Behavior, 339, 343, 347-51 (1985).").

4. If the Predicate Felony is the Same or Similar to the Offenses Alleged in Other Counts, the Prejudicial Effect on the Jury is Devastating to the Defendant

When the predicate felony for a § 922(g)(1) count is the same type of offense as charged in a separate count,

the prejudice is "clear." *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979). The jury will "naturally believe" that a person is guilty of the crime charged if the prosecution proves that he previously committed a similar offense. *United States v. Jones*, 67 F.3d 320, 322 n.6 (D.C. Cir. 1995). In *Gordon v. United States*, 383 F.2d 936, 939 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968), former Chief Justice Burger, then a Judge of the District of Columbia Circuit, recognized the undue prejudice caused by evidence of a prior felony conviction which is similar to the offense charged:

> *A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial.* [footnote omitted] Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." *As a general guide, those convictions which are for the same crime should be admitted sparingly* * * * .

(emphasis added). The impact of evidence of a similar prior offense is devastating to the defendant. As the Ninth Circuit has stated:

> *To allow evidence of a prior conviction of the very crime for which a defendant is on trial may be devastating in its potential impact on a jury.* As we recognized in *United States v. Field*, 625 F.2d 862, 872 (9th Cir. 1980), where, as here, the prior conviction is sufficiently similar to the crime charged, there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a

> conclusion which is impermissible in law: *because he did it before, he must have done it again.* Such a risk was clearly present in this case.

United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985) (emphasis added), *cert. denied*, 475 U.S. 1023 (1986); *see also, Jones v. United States*, 404 F.2d 212, 216 (D.C. Cir. 1968) (Wright, J., concurring) (" * * * 'if he did it before he probably did so this time.' ").

B. Applying the Balancing Test: The Probative Value of the Nature of the Prior Felony Conviction is Outweighed by the Danger of Unfair Prejudice

When there is a danger that a defendant's case will be affected because of the non-probative aspect of evidence offered for admission, the courts apply the balancing test of Rule 403 and decide whether to exclude the evidence. *Bailleaux*, 685 F.2d at 1111, n.2. Where the *danger* of unfair prejudice *"substantially outweighs"* the probative value, the evidence may be excluded. *Ibid.* (emphasis added)

Most courts, in applying the 403 balancing test to the nature of prior felony conviction in a § 922(g)(1) prosecution, have concluded that such evidence is inadmissible. "[E]vidence beyond the fact of the prior conviction is inadmissible absent adequate trial court findings that its non-cumulative relevance is sufficiently compelling to survive the balancing test of Fed.R.Evid. 403." *United States v. Tavares*, 21 F.3d 1, 5 (1st Cir. 1994) *(en banc)*; *United States v. Spletzer*, 535 F.2d 950, 955-956 (5th Cir. 1976). In cases where the defendant is willing to concede

the existence of one prior felony conviction, the trial court "should ordinarily preclude the government from introducing any evidence as to the nature or substance of the conviction, as the probative value of this additional information generally will be overshadowed by its prejudicial effect under Federal Rule of Evidence 403." *United States v. Wacker*, 72 F.3d 1453, 1473 (10th Cir. 1995). "Federal Rule of Evidence 403 embodies the concern for a defendant's right to a fair trial and requires the district court to reject evidence whose prejudicial effect substantially outweighs its probative value." *United States v. Jones*, 67 F.3d 320, 322 (D.C. Cir. 1995). *See also United States v. Gilliam*, 994 F.2d 97, 102-104 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 335 (1993); *United States v. Rhodes*, 32 F.3d 867, 875-876 (4th Cir. 1994) (Hamilton, J., concurring), *cert. denied*, 115 S.Ct. 1130 (1995); *and United States v. King*, 897 F.2d 911, 913-914 (7th Cir. 1990).

The majority of the panel in *United States v. Breitkreutz*, 8 F.3d 688, 691-692 (9th Cir. 1993) ruled that the Rule 403 balancing process does not apply in a § 922(g)(1) prosecution where the defendant is willing to stipulate to his status as a felon. Most other courts, including those cited above, have determined that an offer to stipulate must be considered when weighing the probative value of evidence against the danger of unfair prejudice under Rule 403. *Compare United States v. Quintero*, 872 F.2d 107, 111 (5th Cir. 1989), *cert. denied*, 496 U.S. 905 (1990); *United States v. O'Shea*, 724 F.2d 1514, 1516 (11th Cir. 1984) (A stipulation is "one factor to be considered in the 403 balancing process."); *United States v. Williford*, 764 F.2d 1493, 1498 (11th Cir. 1985) (" * * * we analyze the offer to stipulate as one factor in making the

Rule 403 determination."). The *Breitkreutz* majority essentially concedes that in every case where the probative value of the nature of a prior felony conviction is weighed against its potential for unfair prejudice, "the Rule 403 balance would tip against the prosecution's evidence because it inevitably would have little, if any, probative value." *Id.* at 692. As stated in the concurring opinion, there is "no need to engage in a balancing test under Rule 403 * * * because there is no probative evidence to be weighed against its prejudicial effect." *Id.* at 694 (Norris, J., concurring). By focusing only on the stipulation, the *Breitkreutz* majority sidesteps the correct 403 analysis. Although it must be considered, a stipulation does not get weighed in the 403 balancing process. Instead, trial courts must weigh the evidence which would be admitted in absence of the stipulation. The focus of 403 is on the probative value of the evidence and on the danger of unfair prejudice which the evidence may create. If the danger of unfair prejudice substantially outweighs the probative value of the evidence, then a remedy should be considered. Trial courts must take precautions to ensure that evidence does not unduly prejudice the defendant. *United States v. Abel*, 469 U.S. 45, 54-55 (1984). Consideration of a remedy does not foreclose the application of Rule 403. When considered as a remedy, a stipulation allows the probative fact of the prior felony conviction into evidence but eliminates its prejudicial nature. The *Breitkreutz* majority was wrong not to apply the 403 analysis merely because it objected to stipulation as a form of remedy.

In other situations where a prior conviction may be introduced into evidence, the 403-type balancing test is

applied. Whether other crimes may be admissible under Fed. R. Evid. 404(b) is subject to the 403 analysis. See Fed. R. Evid. 404 advisory committee note ("The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence *in view of the availability of other means of proof* and other factors appropriate for making decisions of this kind under Rule 403.") (emphasis added); *Huddleston v. United States*, 485 U.S. 681, 688 (1988). A 403-type of balancing analysis is factored into Fed. R. Evid. 609.[9] There, with

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[9] Fed. R. Evid. 609 provides, in relevant part, that "[f]or the purpose of attacking the credibility of [the accused as a] witness . . . evidence that [the] accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, and . . . evidence that any witness [including the accused] has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment." App. 4a-5a. Use of convictions to impeach has "generated enormous controversy" because of the "obvious risk of prejudice" and because of "lingering doubts" over the value of this method of impeachment. See Mueller and Kirkpatrick, *Federal Evidence* (2nd ed. 1994), Vol. 3, § 273 p. 211 (for summary of debates and amendments leading to the present form of Rule 609 see pp. 211-227). Because Old Chief did not testify at trial, he was not impeached with his prior felony assault under Rule 609. Nonetheless, an analysis of the impact of Rule 609 is instructive.

Usually, when impeaching a defendant who has testified pursuant to Rule 609, the cross-examiner may ask the defendant about the date and nature of a prior felony conviction and the punishment imposed. See, e.g., *United States v. Dow*, 457 F.2d 246, 250 (7th Cir. 1972). Under common practice, trial courts exclude the nature of the prior felony from Rule 609 impeachment if prejudicial to the defendant. This remedy is virtually never appealed. However, in at least two reported

the exception of prior dishonesty or false statement offenses, a prior felony is not admissible to impeach the credibility of a testifying defendant unless the trial court determines that the probative value of admitting that evidence outweighs its prejudicial effect to the accused.

In § 922(g)(1) cases, the Rule 403 balancing test must be applied to evidence of the nature of a defendant's prior felony conviction. Because the danger of unfair prejudice of such evidence substantially outweighs any possible probative value, a trial court must apply a remedy to exclude the evidence.

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cases, the reviewing court affirmed the decision of the trial court to limit impeachment by use of the fact of the prior felony only, thereby excluding evidence of the nature of the prior felony.

In *United States v. Fountain*, 642 F.2d 1083, 1091-1092 (7th Cir. 1981), *cert. denied*, 451 U.S. 993 (1981), where the defendant was charged with first degree murder and had a prior conviction of premeditated murder, the jury was told that the defendant had previously committed a serious crime but "they did not know *which* serious crime he had committed." (emphasis by the court). In *United States v. Fay*, 668 F.2d 375 (8th Cir. 1981), the defendant was charged with several counts of assault including assault resulting in serious bodily injury. The defendant had a prior conviction of assault with a deadly weapon. *Id.* at 379. The court approved the trial court's limitation of the prejudicial effect by "prohibiting the disclosure of the *nature* of the assault conviction" during Rule 609 impeachment. *Ibid.* (emphasis added). If evidence of the nature of a defendant's prior felony conviction can be excluded under Rule 609, such evidence can and should be excluded in a § 922(g)(1) case.

C. The Nature of His Prior Felony Conviction was Unduly Prejudicial to Old Chief

The prosecution in this case never attempted to establish the relevancy of the nature of Old Chief's prior assault conviction – either before, during or after trial. As demonstrated above, no cases have logically established that the nature of a prior felony conviction is relevant in a § 922(g)(1) case. Thus, the nature of Old Chief's prior felony assault conviction should not have been admissible under Fed. R. Evid. 401 and 402.

For Old Chief, the "unfair spillover effect" of the joinder of the § 922(g)(1) count with the other counts was obvious. The predicate felony for his § 922(g)(1) count is assault resulting in serious bodily injury. Where the predicate felony involves violence, the prejudicial impact of such evidence is "further exacerbated" when the additional counts allege crimes of violence. See *United States v. Rhodes*, 32 F.3d 867, 874-875 (4th Cir. 1994) (Hamilton, J., concurring), *cert. denied*, 115 S.Ct. 1130 (1995). Counts II and III against Old Chief were crimes of violence and were even labelled as such in the trial court's jury instructions. J.A. 36, 37. "That jurors might be more inclined to convict defendants who have committed violent * * * crimes * * * is precisely why the jury should not be informed of the underlying facts of the prior conviction." *United States v. Breitkreutz*, 8 F.3d 688, 694 (9th Cir. 1993) (Norris, J., concurring).

The probative value of the nature of Old Chief's prior felony assault conviction to the § 922(g)(1) count was nil. The danger of unfair prejudice caused by this prior assault, particularly as to the jury's consideration of his

guilt or innocence of the assault with a deadly weapon charge, was extremely high. "[T]he danger of undue prejudice by allowing the government to introduce evidence regarding the nature of [the defendant's] prior felony conviction was *manifest* in view of the virtually identical charges in the indictment." *United States v. Jones*, 67 F.3d 320, 324 (D.C. Cir. 1995). (Emphasis added). The probative value of the nature of Old Chief's predicate felony was *substantially outweighed* by the danger of unfair prejudice. Thus, evidence of the nature of the felony should have been excluded under Fed. R. Evid. 403.

III. THE DISTRICT COURT SHOULD REQUIRE THE GOVERNMENT TO STIPULATE TO THE DEFENDANT'S STATUS AS A FELON AND PRECLUDE THE GOVERNMENT FROM INTRODUCING EVIDENCE OF THE NATURE OF THE PRIOR FELONY CONVICTION IN A FELON IN POSSESSION OF A FIREARM CASE

A. A Stipulation to a Defendant's Status as a Felon is the Most Appropriate and Least Intrusive Remedy

A stipulation to a defendant's status as a felon is the most appropriate and least intrusive remedy to the danger of prejudice from the nature of the prior felony. If a defendant stipulates to his status as a felon, the trial court may then instruct the jury that the defendant "has been convicted of a crime punishable by imprisonment for a term exceeding one year," thus satisfying the prior felony

conviction element of § 922(g)(1).[10] "This allows the jury to appreciate the seriousness of the crime, without prejudicing the jury with potentially inflammatory specifics." *United States v. Gilliam*, 994 F.2d 97, 103 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 335 (1993).

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[10] Other remedies for extinguishing the prejudice of the nature of a prior felony conviction in a § 922(g)(1) case have been identified, and applied, by the courts. These include a redacted record, testimony by a clerk of court, a defendant's affidavit or judicial notice of the prior conviction. *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (*en banc*). Upon proper motion, the allegation of the nature of the prior felony conviction may be stricken from the indictment as surplusage pursuant to Fed R. Crim. P. 7(d). *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979); *United States v. Kemper*, 503 F.2d 327, 329 (6th Cir. 1974) ("The granting of such a motion is proper, however, only where the words stricken are not essential to the charge."), *cert. denied*, 419 U.S. 1124 (1975). A sworn admission signed by the defendant conceding the prior felony conviction element of the offense is another alternative. *United States v. Spletzer*, 535 F.2d 950, 953 (5th Cir. 1976).

When a felon in possession of a firearm count has been joined together with other offenses in the same indictment, some courts have held that such joinder requires "either severance, bifurcation, or some other ameliorative procedure." *United States v. Jones*, 16 F.3d 487, 492 (2nd Cir. 1994); *United States v. Joshua*, 976 F.2d 844, 847-848 (3rd Cir. 1992) and *United States v. Dockery*, 955 F.2d 50, 53-54 (D.C. Cir. 1992). Severance of the § 922(g)(1) count is the obvious remedy unless evidence of the prior felony conviction would be independently admissible on the other counts. *United States v. Busic*, 587 F.2d 577, 585 (3rd Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980). Moreover, a stipulation to the nature of the prior felony conviction could sufficiently reduce prejudice so that joinder is permissible, thereby relieving the necessity to sever. *United States v. Hudson*, 53 F.3d 744, 747 n.2 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 235 (1995); *United States v. Burgess*, 791 F.2d 676, 679 (9th Cir. 1986).

At least seven circuits now require stipulation to the fact of the prior felony conviction as a remedy to the potential of undue prejudice in a § 922(g)(1) prosecution. Most recently, the Tenth Circuit held that "where a defendant offers to stipulate as to the existence of a prior felony conviction, the trial judge should permit that stipulation to go to the jury as proof of the status element of section 922(g)(1), or provide an alternative procedure whereby the jury is advised of the fact of the former felony, but not its nature or substance." *United States v. Wacker*, 72 F.3d 1453, 1472-1473 (10th Cir. 1995). Last fall, the District of Columbia Circuit concluded that " * * * at least when the defendant stipulates to the fact of a felony conviction, the district court should avoid mentioning the nature of the prior felony to the jury." *United States v. Jones*, 67 F.3d 320, 325 n. 10 (D.C. Cir. 1995).

When a defendant offers to stipulate to the fact of the prior felony conviction, "evidence of the nature of the conviction is irrelevant and will not be admitted." *United States v. Milton*, 52 F.3d 78, 81 n.7 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 222 (1995); *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979). The following instruction was approved in *United States v. Palmer*, 37 F.3d 1080, 1085 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1804 (1995): "[T]he parties have stipulated that defendant has been convicted of a crime punishable by imprisonment for a term in excess of one year, and you should regard the second element as proven beyond a reasonable doubt." The Seventh Circuit, in *United States v. Pirovolos*, 844 F.2d 415, 420 (7th Cir. 1988) (*en banc*), *cert. denied*, 488 U.S. 857 (1988), found that "[t]he trial judge should not have admitted evidence of [the defendant's] prior convictions; the

defense's proffered stipulation that [the defendant] has been convicted of a prior felony was sufficient." *See also United States v. Tavares*, 21 F.3d 1, 3, 6 (1st Cir. 1994) (*en banc*).

Other courts have approved of stipulations to the accused's status as a felon as a procedure to eliminate unfair prejudice in § 922(g)(1) cases. In *United States v. Gilliam*, 994 F.2d 97, 99 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 335 (1993), the court approved a stipulation which "precluded documentary or testimonial proof of the conviction, thus preventing the jury from knowing the circumstances and type of the offense." The Third Circuit, in *United States v. Jacobs*, 44 F.3d 1219, 1224-1225 (3rd Cir. 1995), *cert. denied*, 115 S.Ct. 1835 (1995), approved the government's refusal to stipulate to the fact of the prior felony conviction only because "there was an independent basis [Rule 609 impeachment] for admitting the fact that the defendant's prior conviction was for burglary." The Sixth Circuit has recognized that " * * * an agreement to stipulate in the same cause [where joinder of counts is too prejudicial] could reduce prejudice enough that joinder is permissible." *United States v. Hudson*, 53 F.3d 744, 747 n.2 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 235 (1995). In *United States v. Leeper*, 964 F.2d 751, 752 (8th Cir. 1992), the Eighth Circuit approved a stipulation "that the jury would be informed only that [the defendant] had been 'convicted of a crime punishable by imprisonment for a term exceeding one year.' "). *See also United States v. Felici*, 54 F.3d 504, 506 (8th Cir. 1995) ("The government simply read a stipulation * * * [n]othing was introduced regarding the nature of the prior offenses."), *cert. denied*, 116 S.Ct. 251 (1995)

In *United States v. Barker*, 1 F.3d 957, 958 (9th Cir. 1993), *amended on denial of reh'g*, 20 F.3d 365 (1994), the court approved the government's agreement "to stipulate to [the defendant's] felony status." *See also United States v. Burgess*, 791 F.2d 676, 679 (9th Cir. 1986) ("[The defendant's] prior conviction was entered on the record by stipulation which simply stated that he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year. Neither the nature of the crime nor the length of sentence was disclosed. There was no further reference during the trial to [his] prior conviction.")

A stipulation to the defendant's status as a felon which provides for submission of a jury instruction that the defendant "has been convicted of a crime punishable by imprisonment for a term exceeding one year," as was requested by Old Chief, proves the prior felony conviction element of § 922(g)(1) without any additional documentation such as a redacted indictment or written admission. Such a procedure eliminates any possible prejudice from evidence of the nature of the prior felony.

B. A Stipulation to a Defendant's Status as a Felon and Preclusion of Evidence of the Nature of the Prior Felony Conviction Does Not Interfere with the Prosecution's Burden to Prove Every Element of the Offense of Felon in Possession of a Firearm

Although "[t]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense," *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 481

(1991), the fact of the prior felony conviction, not the nature of the prior felony conviction, is the element required by § 922(g)(1). Therefore, exclusion of the nature of the prior felony conviction does not interfere with the prosecution's burden to prove every element of the crime. *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (*en banc*) (" * * * excluding the extraneous information concerning [the] nature [of the prior felony conviction] should create no burden for either the court or the government.") Unlike *Estelle*, where this Court found that evidence of the battered child syndrome was relevant to show intent, evidence of the nature of a prior felony conviction in a § 922(g)(1) prosecution is not relevant. See, *Estelle*, *ibid*.

The government has a right to present its case as it deems fit. *Tavares*, 21 F.3d at 4. However, the government's right to present its case is subject to the Rules of Evidence and fundamental fairness. *United States v. Doerr*, 886 F.2d 944, 969 (7th Cir. 1989). This right of the government is "in no fashion weakened by requiring a stipulation to establish the defendant's status as a felon * * * [t]he predicate crime is significant only to demonstrate status, and a full picture of that offense is, even if not prejudicial, beside the point." *Tavares*, *Id*. at 4.

Generally, a party may not preclude his adversary's proof by an admission or offer to stipulate. See, e.g., *United States v. Brickey*, 426 F.2d 680, 685-686 (8th Cir. 1970), *cert. denied*, 400 U.S. 828 (1970). "Nonetheless, this principle, like all rules of evidence, is subject to the provision that where the probative value of relevant evidence is substantially outweighed by its potential for unfair prejudice, it should be excluded [citing Fed. R. Evid. 403]." *United States v. Spletzer*, 535 F.2d 950, 955-956

(5th Cir. 1976). Excluding only the nature and circumstances of a defendant's prior felony conviction does not prevent the jury from being apprised of all the elements of a § 922(g)(1) offense, including the element of a prior felony conviction, nor does it impinge on the government's right to prove all essential elements of the case. *United States v. Wacker*, 72 F.3d 1453, 1472 (10th Cir. 1995). Likewise, excluding evidence of the nature of the prior felony conviction does not modify the statute. The crime of felon in possession of a firearm would be changed only where the government was precluded from making any mention to the jury of the defendant's status as a felon. *United States v. Williams*, 612 F.2d 735, 740 (3rd Cir. 1979), *cert. denied*, 445 U.S. 934 (1980).

A stipulation to the defendant's status as a felon, thus eliminating evidence of the nature of the prior felony, is distinguishable from stipulations to the actions or state of mind of the defendant. Certainly, the prosecution has the right to present a full picture of the events of the alleged offense to the jury. *See Brickey*, 426 F.2d at 686, and *Parr v. United States*, 255 F.2d 86, 88 (5th Cir. 1958), *cert. denied*, 358 U.S. 824 (1958). But there is no authority for the proposition that a prosecutor may refuse stipulations limited solely to the question of status. *United States v. Breitkreutz*, 8 F.3d 688, 695 n.2 (9th Cir. 1993) (Norris, J., concurring). "[A] stipulation to a defendant's status as a felon is easily and obviously distinguishable from those relating to his actions or state of mind in committing the crime." *United States v. Tavares*, 21 F.3d 1, 6 (1st Cir. 1994) (*en banc*). Old Chief was not trying to prevent the government from presenting the full and real life context of the three offenses charged. Instead, he was trying to prevent

the jury from improperly basing its verdict on evidence that he had a propensity for crime. *United States v. Yeagin*, 927 F.2d 798, 802 (5th Cir. 1991).

A stipulation rule, as formulated by the First Circuit in *Tavares*, 21 F.3d at 5, would not limit the prosecutor's ability to present the details of a prior felony conviction when those details have "relevance independent of simply proving prior felony status for Section 922(g)(1)." *United States v. Wacker*, 72 F.3d 1453, 1473 (1st Cir. 1995). "Thus, the prosecution retains broad discretion to introduce the underlying circumstances of a crime when those circumstances are truly relevant to the presentation of the case." *Ibid*. "A decision to honor a stipulation concerning the predicate crime in a felon-in-possession case in no way trenches upon the right of the prosecution to make a full presentation of the crime currently charged." *Tavares*, *Id*. at 3.

C. The Government Had No Valid Reason to Refuse to Stipulate to Old Chief's Status as a Felon

A prosecutor's duty is not only to use every legitimate means to bring about a just conviction, but to refrain from improper methods calculated to produce a wrongful conviction. *Berger v. United States*, 295 U.S. 78, 88 (1935). This Court's precedent obliges the prosecutor to prevent unfair prejudice. *United States v. Daniels*, 770 F.2d 1111, 1118-1119 (D.C. Cir. 1985); *United States v. Dockery*, 955 F.2d 50, 55 (D.C. Cir. 1992). The prosecutor here "failed to discharge that obligation by opposing the

more moderate remedy proposed by the defense." *United States v. Jones*, 67 F.3d 320, 324 (D.C. Cir. 1995).

"Unfortunately, a side consequence of [§ 922(g)(1)] has been to provide federal prosecutors with a powerful tool for circumventing the traditional rule against introduction of other crimes evidence." *Daniels, Id.* at 1118. If an ex-felon is charged with an offense involving the use of a gun, prosecutors may inform the jury of his prior conviction "merely by taking the time to include a charge of firearms possession." *Ibid.* However, as noted in one treatise, " * * * the creation of ex-felon crimes was not intended to undermine the basic principle excluding evidence of the defendant's character, particularly (it seems) in the case of firearms possession charges, which can be so readily 'tacked on' to any number of other 'substantive' offenses such as robbery." Mueller and Kirkpatrick, *Federal Evidence* (2nd ed. 1994), Vol. 1, § 105, p. 581.

At some point after § 922(g)(1) was enacted, the Department of Justice apparently determined that every § 922(g)(1) indictment should include the name, date and jurisdiction of the prior felony conviction element. Indeed, United States Attorneys have been instructed to take full advantage of the defendant's prior felony record unless prevented by circuit court precedent. Dep't of Justice Manual/United States Attorneys Manual, Vol. III(b), Title 9, Criminal Division, Chap. 63, § 9-63.513, p. 19 (July, 1992 Supp.)[11] Despite the government's official

[11] § 9-63.513 of the Manual provides: "Charging More Than One Prior Felony in an Indictment for Violation of Section 922(g). The Circuit Courts of Appeals have differed as to whether the government may properly charge more than one prior felony in an indictment for violation of 18 U.S.C. § 922(h) and 18 U.S.C. App. § 1202, the predecessor provisions of 18 U.S.C. § 922(g). Recent congressional amendments have not addressed the issue as to whether the government may seek to prove more than one prior felony conviction even if the defendant offers to stipulate that he is a convicted felon. Thus, indictments charging violations of 18 U.S.C. § 922(g) should continue to be drafted in accord with circuit court precedent, and where there is no such precedent, in the manner most advantageous to the government." *See also* the sample indictment for a § 922(g)(1) offense which directs the United States Attorney to "[s]pecify the places and dates of indictments, commitments" with respect to the allegation of the prior felony conviction element. United States Attorneys Book, Firearms 18 U.S.C. § 922(g).

posture, the courts soon recognized that "the better practice dictates" that the indictment "merely allege that the defendant is a convicted felon." *United States v. Busic*, 587 F.2d 577, 585 (3rd Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980); *United States v. Kemper*, 503 F.2d 327, 329 (6th Cir. 1974) ("The particular factual circumstances attending the prior conviction and those of the present case would appear to make the recitation to the jury in the indictment of the detailed description of the prior conviction peculiarly prejudicial."), *cert. denied*, 419 U.S. 1124 (1975).[12]

Under Fed. R. Evid. 404(b), the prosecution must give "reasonable notice in advance of trial" of its intent to

[12] The government recently took this more enlightened approach. In *United States v. Jones*, 67 F.3d 320, 322 (D.C. Cir. 1995), the government conceded on appeal that evidence of the nature of the defendant's prior felony conviction "should not have been admitted as part of his § 922(g) prosecution once [the defendant] offered to stipulate to the fact of that conviction."

introduce other crimes evidence and of the purpose for such evidence. Although Old Chief requested such notice, no notice was provided. More importantly, the prosecution never claimed that Old Chief's prior assault was admissible under Rule 404(b). As this Court confirmed in *Huddleston v. United States*, 485 U.S. 681, 690 (1986), the offering party must show by a preponderance of the evidence that the prior crime occurred and that proof of the prior crime is relevant and admissible under Rule 404(b). "The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." *Id.* at 686. The prosecutor here never established that the prior felony assault conviction was probative of anything other than Old Chief's propensity to commit similar crimes. "The government did not seek to admit evidence of the nature of [the defendant's] prior felony conviction on alternative grounds. Hence, we have no occasion to address its admissibility under [Rule] 404(b)." *United States v. Jones*, 67 F.3d 320, 323 n.8 (D.C. Cir. 1995).

The government had no need to inform the jury of the nature of Old Chief's felony, and the clear purpose was to prejudice the jury against Old Chief. "[O]ther than the government's desire to color the jury's perception of [Old Chief's] character," the prosecution had no reason for revealing the nature of Old Chief's prior felony conviction. *United States v. Tavares*, 21 F.3d 1, 5 (1st Cir. 1994) (*en banc*). In light of Old Chief's offer to stipulate, "[t]o have made the jury aware of the nature of the offense went beyond the purpose for which the government asserted the right to introduce evidence of other crimes."

United States v. Cook, 538 F.2d 1000, 1005 (3rd Cir. 1976). As stated by Justice Blackman, dissenting in *Marshall v. Lonberger*, 459 U.S. 422, 447 (1983):

> It is enough for me in this case to note the utter absence of a legitimate state interest once the prosecution refused to accept respondent's proffered stipulation. That refusal revealed that the prosecution believed the indictment had prejudicial value, and it rendered nonexistent any otherwise legitimate interest the State might have had in introducing the indictment.

See also United States v. Foskey, 636 F.2d 517, 525-526 (D.C. Cir. 1980) ("There is a large measure of responsibility in the prosecutor to weigh the evidence independently: if its relevance is outweighed by the danger of unfairly prejudicing, confusing, or misleading the jury, it should not be introduced. The assistant United States attorney must step back from his or her partisan role and make these determinations in an objective and fair-minded fashion before proffering the evidence [footnote omitted].").

D. A Trial Court Has the Duty to Prevent Unfair Prejudice Despite the Government's Refusal to Stipulate to a Defendant's Status as a Felon

1. A Trial Court Has the Duty and Discretion to Prevent Unfair Prejudice

"[U]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." *Glasser v. United States*, 315 U.S. 60, 71 (1942). Trial courts have the duty to take precautions to

ensure that evidence does not unduly prejudice the defendant. *United States v. Abel*, 469 U.S. 45, 54-55 (1984).

The presumption of innocence, although not specifically set forth in the Constitution,[13] is a "basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). "Without doubt" disclosure of the nature of the accused's prior felony conviction places an "unnecessary burden" on the presumption of innocence. *United States v. Blackburn*, 592 F.2d 300, 301 (6th Cir. 1979) (DeMascio, J., concurring). "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice,

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[13] Old Chief's contentions have necessarily implicated the question of whether his fundamental, and indeed, constitutional rights have been infringed, including those rights protected by the Fifth and Sixth Amendments to the United States Constitution such as due process, fundamental fairness, the right to a trial by a fair and impartial jury, and the application of the presumption of innocence. In *Spencer v. Texas*, 385 U.S. 554 (1967), this Court, in a five to four decision, rejected the contention that the admission of evidence of a criminal defendant's prior convictions in the trial of the pending criminal charges was *constitutional* error because of its prejudicial effect. Nevertheless, five members of the Court, including Justice Stewart, who concurred separately, would have barred the admission of such evidence in a case invoking the exercise of the Court's *supervisory* powers over criminal procedures in the federal courts. *Id.* at 569, 573 n.4. *See also Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983). Thus, the Court can decide this case under its supervisory powers without considering any constitutional right including the Fifth Amendment standard of due process of law.

courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt [citing *In re Winship*, 397 U.S. 358, 364 (1970)]." *Estelle, Ibid.*

A trial court has "wide discretion" in determining the admissibility of evidence under the Federal Rules. *Abel, Id.* at 54. Furthermore, a trial court has the discretion to decide what procedures should be used to insulate the jury from prejudicial information. *United States v. Jacobs*, 44 F.3d 1219, 1228 (3rd Cir. 1995), *cert. denied*, 115 S.Ct. 1835 (1995). Consequently, a trial court's decision to admit or reject prejudicial evidence under Fed. R. Evid. 403 is subject to review under an abuse of discretion standard. *Abel, Id.* at 55. Nonetheless, if the record reveals that the trial court did not engage in a Rule 403 weighing analysis, the decision of the trial court need not be given any deference on appeal. *See, e.g., United States v. Talavera*, 668 F.2d 625, 631 (1st Cir. 1982), *cert. denied*, 456 U.S. 978 (1982). Only if "it appears from the record as a whole that the trial judge adequately weighed the probative value and prejudicial effect of proffered evidence before its admission," will a reviewing court conclude that the demands of Rule 403 have been met. *United States v. Sangrey*, 586 F.2d 1312, 1315 (9th Cir. 1978).

2. If the Government Refuses to Stipulate, a Trial Court Must Eliminate the Danger of Unfair Prejudice Caused by Evidence of the Nature of a Defendant's Prior Felony Conviction

Even in absence of a stipulation, the nature and underlying circumstances of the prior felony conviction should not be admitted in a § 922(g)(1) prosecution unless employed for proper impeachment or other necessary purposes. *United States v. Rhodes*, 32 F.3d 867, 875 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1130 (1995). If the government refuses to stipulate, the trial court should "provide an alternative procedure whereby the jury is advised of the fact of the former felony, but not its nature or substance." *United States v. Wacker*, 72 F.3d 1453, 1472-1473 (10th Cir. 1995) (see fn. 10 above).

A trial court must take proper action to prevent any undue prejudice caused by evidence of the nature of a prior felony conviction. *United States v. Poore*, 594 F.2d 39, 42 (4th Cir. 1979); *United States v. Gilliam*, 994 F.2d 97, 102 (2nd Cir. 1993) (Had the government refused to stipulate, "the district court would have excluded any information about the nature of the prior convictions, since merely the proof of the fact of one conviction would be sufficient for § 922(g)(1)."), *cert. denied*, 114 S.Ct. 335 (1993); and *United States v. Pirovolos*, 844 F.2d 415, 420 (7th Cir. 1988) (*en banc*), *cert. denied.*, 488 U.S. 857 (1988). The trial judge's duty to limit prejudice is amplified when trying an ex-felon count together with other counts. In such a situation, "the trial judge must 'proceed with caution' to avoid undue prejudice." *United States v. Dockery*, 955 F.2d 50, 53

(D.C. Cir. 1992) (quoting *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985)).

As a final protection against unfair prejudice to a defendant, the trial court, upon request, must instruct the jury that the jury can only consider evidence of a prior conviction for the purpose for which it was offered and not as an indication of criminal propensity. Fed. R. Evid. 105. If the trial court gives such a cautionary instruction, "either on request or on its own motion, the court must be careful to instruct the jury correctly as to the limited purpose for which the evidence is admitted." *United States v. Aims Back*, 588 F.2d 1283, 1287 (9th Cir. 1979).

3. The Trial Court Breached its Duty and Abused its Discretion by Admitting Evidence of Old Chief's Prior Assault Conviction

If a judge is "acutely aware" of the possibility of prejudice and is "strict" in his charge to the jury, the likelihood of undue prejudice affecting the verdict is minimized. *Schaffer v. United States*, 362 U.S. 511, 516 (1960). The trial court ignored the danger of unfair prejudice created by Old Chief's prior assault conviction. Furthermore, the trial court's jury instructions were confusing and contradictory.

The trial judge in Old Chief's case disregarded the danger of prejudice despite a written motion *in limine* and oral argument thereon. J.A. 6-10; 14-16. Rather than considering the prejudicial impact of Old Chief's prior assault, the judge denied the motion *in limine* simply because the prosecutor refused to stipulate. J.A. 16. The

judge never applied the Rule 403 balancing test. "[W]here a prior conviction is part of the offense and the defendant offers to stipulate to the prior conviction, it may constitute an abuse of discretion to allow the nature of the offense to be admitted." *United States v. O'Shea*, 724 F.2d 1514, 1516 (11th Cir. 1984).

Indifferent to its extremely prejudicial impact, the judge did not carefully or correctly instruct the jury to not consider Old Chief's prior assault conviction in determining Old Chief's guilt or innocence on the new charges. J.A. 23-42. Although the prosecutor did not present the prior assault as evidence of other crimes under Rule 404(b), the court instructed the jury to consider evidence of "other acts * * * only as it bears on the defendant's knowledge and intent and for no other purpose." J.A. 31. In direct contradiction, and despite the fact that Old Chief did not testify, the court instructed the jury to consider evidence of Old Chief's prior felony conviction "only as it may affect [his] believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." J.A. 31. Even when properly instructed, "jurors are likely to regard * * * evidence [of a prior assault] as proof of a defendant's turbulent character and to conclude that he acted consistently with that character at the time charged in the indictment." *United States v. Bettencourt*, 614 F.2d 214, 218 (9th Cir. 1980). Old Chief's jury improperly considered his propensity for assaultive behavior because the trial judge did not carefully instruct the jury.

By disregarding the unfair prejudice of Old Chief's prior assault, the trial judge failed to consider any alternative remedies to stipulation. Old Chief requested that

the jury be instructed that he "has been convicted of a crime punishable by imprisonment for a term exceeding one year," (J.A. 11). Instead of eliminating the prejudicial impact of the prior assault, the court improperly focused the jury's attention on the nature of Old Chief's prior: " * * * I instruct you that the offense of Assault Resulting in Serious Bodily Injury is a crime in the federal courts of the United States, punishable by imprisonment for more than one year." J.A. 34.

In sum, the trial judge unnecessarily allowed undue prejudice from the nature of Old Chief's prior conviction into the trial. "[A]lthough the district court gave limiting instructions, the nature of the prior felony was repeatedly brought to the jury's attention by the judge and the prosecutor." *United States v. Jones*, 67 F.3d 320, 324 (D.C. Cir. 1995). This affected the jury's determination of Old Chief's guilt or innocence on all three counts. As in *Jones*, the district court breached its duty and abused its discretion in denying Old Chief's motion *in limine* to exclude evidence of the nature of his prior felony conviction. *Id.* Old Chief is entitled to a new trial on all three counts.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit must be reversed and the case remanded with instructions to grant a new trial.

Respectfully submitted,

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APPENDIX

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CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * * * "

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATUTES

18 U.S.C. §§ 922 and 921 (Supp. 1996)

1. 18 U.S.C. § 922(g) provides:

It shall be unlawful for any person –

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year * * * to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. § 921(a)(20) provides:

The term "crime punishable by imprisonment for a term exceeding one year" does not include –

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

FEDERAL RULES OF EVIDENCE

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) **Character evidence generally**. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) **Character of accused**. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim**. Evidence of a pertinent trait of character of the victim of the

crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness**. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts**. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) **General rule**. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall

be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) **Time limit**. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of pardon, annulment, or certificate of rehabilitation**. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile adjudications**. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) **Pendency of appeal**. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.